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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re DEVONTE M., a Person Coming Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent, **A124604**

v. **(Alameda County Super. Ct. No. SJ09012108)**

DEVONTE M.,

Defendant and Appellant.

_____/

Devonte M. appeals from a disposition entered after he admitted possessing a sawed-off shotgun. (Pen. Code, § 12020, subd. (a)(1).) He contends (1) the juvenile court erred when it denied his motion to suppress, and (2) two of the probation conditions that the court imposed were erroneous. We reject appellant's first argument but will remand the case to allow the juvenile court to explain its decision more fully.

I. FACTUAL AND PROCEDURAL BACKGROUND

On March 14, 2009, Union City Police Officers Yousuf Shansab and Joshua Clubb were on patrol in a shopping district that had been the scene of several robberies in the preceding months. Shansab and Clubb were in an unmarked car, but were wearing jackets that identified themselves as Union City police.

Around 4:30 that afternoon, Shansab and Clubb saw appellant and an acquaintance loitering in front of a store. Both were wearing baggie pants and baggie hooded sweaters. Appellant was walking in such a way that it appeared he was hiding something in the waistband of his pants. After watching the young men for about 10 minutes, the officers decided to contact them. Shansab and Clubb got out of their car and Clubb said something like "how is it going[.]" Appellant's acquaintance responded by saying he was on probation for robbery. Appellant, by contrast, began to walk away and shouted, "I'm not on probation."

Shansab followed appellant. As he did, it became even more apparent that appellant was hiding something in his waistband. Appellant's right arm swung freely, but his left arm was pinned against his left side. Officer Shansab called appellant back and told him to keep his hands visible. Appellant complied. Shansab then asked appellant to lift his sweater. After resisting initially, appellant complied. Shansab saw what appeared to be the outline of a rifle stock. Shansab removed the object which proved to be an older model sawed-off shotgun.

Based on these facts, a petition was filed alleging appellant came within the jurisdiction of the juvenile court because he possessed a sawed-off shotgun.

Appellant filed a motion to suppress arguing his detention was illegal. The trial court conducted a hearing on appellant's motion and denied it. Appellant then admitted the allegation in the petition was true.

At disposition, the court found appellant's violation to be a misdemeanor and placed him on probation subject to several terms and conditions.

II. DISCUSSION

A. Motion to Suppress

Appellant contends the trial court erred when it denied his motion to suppress.

The standard of review we apply is settled. We defer to the trial court's express or implied factual findings when they are supported by substantial evidence. We then exercise our independent judgment to determine whether, on the facts so found, the

search or seizure was reasonable under the Fourth Amendment. (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

Here, appellant challenges the validity of his detention. Notably, he *does not* contend his final detention by Officer Shansab was invalid. Rather, he focuses on the initial stages of his interaction with Officers Shansab and Clubb arguing their "attempt[ ] to detain [him]" as he stood in front of the store was unjustified and therefore invalid.

We reject this argument because the law does not recognize or require justification for an "attempted detention".

California v. Hodari D. (1991) 499 U.S. 621 (*Hodari D.*) is directly on point. In *Hodari D.*, police officers patrolling a high crime area in Oakland saw the defendant and others huddled near a car. When the defendant and his cohorts saw the officers' car, they scattered. The officers gave chase and just as one of them was about to apprehend the defendant, he discarded what appeared to be a rock. The officer apprehended the defendant and retrieved the rock. It was crack cocaine. (*Id.* at pp. 622-623.) The question on appeal was whether at the time the defendant dropped the cocaine, he was "'seized' within the meaning of the Fourth Amendment." (*Id.* at p. 623, fn. omitted.) More specifically, the court framed the issue as being whether "with respect to a show of authority . . . a seizure occurs even though the subject does not yield." (*Id.* at p. 626.) The high court's ruling was succinct: "[I]t does not." (*Ibid.*) The court explained its ruling as follows: "The word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. ('She seized the purse-snatcher, but he broke out of her grasp.') It does not remotely apply, however, to the prospect of a policeman yelling 'Stop, in the name of the law!' at a fleeing form that continues to flee. That is no seizure. . . . [¶] We do not think it desirable, even as a policy matter, to stretch the Fourth Amendment beyond its words . . . . Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged. Only a few of those orders, we must presume, will be without adequate basis, and since the addressee has no ready means of identifying the deficient ones it almost invariably is the responsible course to

comply. Unlawful orders will not be deterred, moreover, by sanctioning through the exclusionary rule those of them that are *not* obeyed. Since policemen do not command 'Stop!' expecting to be ignored, or give chase hoping to be outrun, it fully suffices to apply the deterrent to their genuine, successful seizures." (*Id.* at pp. 626-627, fns. omitted, original italics.)

Here , as appellant admits, he did not submit to Officers Shansab and Clubb when they first approached him. Rather, he walked away. Since appellant was not "seized" within the meaning of the Forth Amendment, it is irrelevant whether such a seizure would have been justified.

Appellant argues that *Hodari D.* does not in fact stand for the proposition that a seizure requiring constitutional justification only occurs when a person submits to authority. He further argues that to the extent *Hodari D.* can be read to support that proposition, it is "dicta." We simply disagree with both arguments. As the passages we have quoted demonstrate, that was the *holding* of *Hodari D.* Indeed, our own Supreme Court has recognized that fact. (See *People v. Souza* (1994) 9 Cal.4th 224, 239, fn. 3.)

Appellant contends his argument that "attempted detentions" must be constitutionally justified is supported by language in *U.S. v. Caseres* (9th Cir. 2008) 533 F.3d 1064, 1069 (*Caseres*), where the court stated that the detention at issue, "if successful, would likely have been unconstitutional . . . ." However, by conditioning its statement that the detention would likely have been unconstitutional if it had been "successful" the *Caseres* court acknowledged the holding of *Hodari D.* Indeed, the *Caseres* court specifically cited the *Hodari D.* decision and its holding that a seizure only occurs when a person submits to a show of authority. (*Caseres, supra,* at p. 1069.) *Caseres* does not assist appellant.

We conclude the trial court correctly denied appellant's motion to suppress.

B. Challenges to the Disposition

Appellant challenges the disposition that was imposed in two respects. The first relates to a travel condition. The report prepared prior to the dispositional hearing recommended that appellant not leave Alameda County without the prior permission of

his probation officer or parents. The juvenile court did not mention that condition at the dispositional hearing. However, the minute order the court signed does contain a variant of that recommendation. It ordered that appellant not leave Alameda County without the prior permission of his probation officer.

Appellant now contends the condition must be stricken because the court's oral pronouncement controls over its written order. In fact, the rule is not as inflexible as appellant suggests. Whether the recitals in the clerk's minutes should prevail against contrary statements in the reporter's transcript depends upon the circumstances of each case. (*People v. Smith* (1983) 33 Cal.3d 596, 599.) The circumstances of this case do not allow us to reliably assess which of the two alternatives is more likely to be correct. On the one hand, the signed minute order does include the travel restriction. On the other hand, the court did not mention that restriction at the disposition hearing, and the court even questioned appellant about the high school he was attending, a school the dispositional report indicated was outside of Alameda County. It might well be possible to rely on presumptions and inferences to resolve this dispute. However, given the fundamentally contradictory record before us, we elect to simply remand the case to the juvenile court so it can clarify its intent. (Cf. *People v. Scott* (1994) 9 Cal.4th 331, 355.)

Appellant's other challenge is to a condition that appellant "not associate with anyone who uses or possesses dangerous [or] deadly weapons . . . ." Appellant argues that condition should be modified to prohibit the "knowing" association with those who use or possess such weapons or devices. The People do not object to the modification and we accept the concession. (See *People v. Lopez* (1998) 66 Cal.App.4th 615, 628-629.) We will order the appropriate modification.

III. DISPOSITION

The juvenile court is ordered to conduct a hearing in order to clarify the travel restriction that we have discussed. At that hearing the court must also modify the probation condition that precludes appellant from associating with anyone who uses or possesses dangerous weapons to state appellant shall not knowingly associate with anyone who uses or possesses dangerous weapons.

In all other respects, the disposition is affirmed.

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Jones, P.J.

We concur:

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Simons, J.

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Bruiniers, J.